MICHIGAN SUPREME COURT

PUBLIC HEARING
DECEMBER 13, 2001

JUSTICE CORRIGAN: On behalf of my colleagues I welcome you to this public hearing which the Supreme Court holds from time to time in order to hear from interested parties throughout our state on items of administrative regulation that our Court is engaged in. The rules of the road here are that a speaker has 3 minutes to present the position that you're advocating, so we urge you to get directly to the point because 3 minutes goes by very quickly. Without any further ado I will call Items 1 and 2 on our administrative agenda.

Item 1: 99-20 - Proposed amendments of Rules 2.209, 7.204, 7.212, 7.213 and 7.215

Item 2: 0134

Whether to adopt rule changes to require trial courts to give notice to the Attorney General when a statute, regulation or executive order is under constitutional challenge. Is Bill Martin present? Come forward please.

MR. MARTIN: This Honorable Court has noticed a number of proposed court rule changes that I am here to testify in support of. The Michigan Department of Corrections has one case that has been a problem since its inception and provides outstanding example that these proposed rules would have corrected. Cain v MDOC was originally brought in 1989 and has been moving at a snail's pace ever since. The case was first filed to challenge the Department's policy that limited the nature and amount of property a prisoner could possess. In 1989 the Legislature passed a similar statute and the prisoners amended their suit to additionally challenge the legislation. This legislation codified at MCL 800.42 was challenged by the plaintiffs on its face as causing an unconstitutional taking of prisoners' personal property. The statute took effect on October 18, 1989. On November 14, 1989 the trial court enjoined the statute citing plaintiffs' claims that enforcement of the statute would bring about an unconstitutional taking of the prisoners' property without compensation. The Department filed a motion for summary disposition on November 22, 1989. After being unable to get the trial court to rule on our motion for summary disposition for more than two years we filed a complaint for superintending control with the Court of Appeals on February 10, 1992. The Court did deny our motion for summary disposition on April 7, 1992 citing alleged unresolved questions of fact. The trial court continued the November 14, 1989 injunction preventing enforcement of this statute. We renewed our motion for summary disposition

on October 1, 1992. The trial court did not rule on the motion for nearly five years. Trial began on April 10, 1997. While the trial continued to no great effect, we filed a second complaint for superintending control on August 27, 1997. We asked the Court of Appeals to decide our pending motion for summary disposition, addressing the constitutionality of MCL 800.42 and the statutory sections that file. After first filing a response to our complaint for superintending control, the trial court issued an opinion on October 2, 1997 granting for the motion defendant's motion for summary disposition and holding that MCL 800.42 was not unconstitutional and did not constitute an unconstitutional taking. The order carrying out that decision was entered December 5, 1997--that's 8 years after the original injunction was filed. The plaintiffs who are classed comprised of male prisoners and intervening plaintiffs who are a class made up of female prisoners, filed a joint interlocutory appeal on the December 5, 1997 order on January 30, 1998. That appeal was denied by the Court of Appeals on July 2, 1998. In September of 1998 plaintiffs sought leave to appeal to the Michigan Supreme Court. Leave was denied that same month.

JUSTICE CORRIGAN: Mr. Martin, your time is up sir. Do you want to summarize your position.

MR. MARTIN: I would just say I think this case really points out the problem we have, particularly in state government, as cases are brought before us we can get no resolution. This case has cost the taxpayers over $7 million and there really is no need for that and the proposed court rules would, I think, be a good change that would protect the rights of the defendant and certainly the taxpayers of the state.

JUSTICE CORRIGAN: Very well. Are there any questions, Justices? Thank you sir for appearing this morning. Mr. William T. Burton, the executive assistant to the director of the Department of Environmental Quality. As I understand it sir, you're here on items 1 and 2 and just to correct the record, Director Martin was here on items 1 and 2 as well. And Item 2, just for the record is 0134 and this is whether to amend the rules to require trial courts to expeditiously decide actions in which preliminary injunctions have been granted and to allow such actions to proceed even if the Court of Appeals has granted interlocutory leave. Go ahead, Mr. Burton.

MR. BURTON: Good morning, Your Honors. I am William Burton, executive assistant to Michigan Department of Environmental Quality Director Russell J. Harding. And we agree with the need for the amendment to the current appellate court rules that would require the claim of appeal identified for fast tracking cases involving an unconstitutional ruling of a constitutional provision, statute, regulation or other government action. The DEQ is frequently sued by private citizens in a number of cases relating to the environmental laws that we as a department are charged with enforcing.

Among the environmental laws that pose particular enforcement problems are the state's wetlands laws that result in lawsuits for private citizens. The case of K&K Construction v Dept of Natural Resources, now DEQ, is a prime example for the need of the change for the appellate court rules. The following are the relevant facts of the case. In November 1988 the DEQ denied the permit application to fill 28 acres of wetland for a proposed restaurant/sports complex. IN December of 1988 the landowners filed action against the Department alleging that the denial of the application for the permit to fill the wetlands constituted an unconstitutional taking. In May of 1990 the landowners subsequently submitted a second modified permit application to fill an additional 3 acres of wetland that was also initially denied. The permit to fill the wetlands was denied by the DEQ under the authority of the Wetlands Protection Act. After all that the case was originally tried before the Court of Claims in 1991. In November 1992 the trial court determined that an unconstitutional taking had occurred as a result of these permit denials. As a result in September 1993 the trial court awarded a total judgment of a little over $5 million for the plaintiffs. The DEQ appeals the September 1993 trial court judgment and the Court of Appeals affirmed the trial court's judgment on June 4, 1996 which resulted in nearly a 3-year delay between the initial trial court ruling and the Court of Appeals ruling. A nearly 2-year delay occurred between the Court of Appeals ruling and the subsequent Supreme Court ruling when on March 24, 1998 this Supreme Court reversed the Court of Appeals and remanded the case back to the trial court for a new trial. A new trial finally commenced early this year after settlement negotiations proved futile. In sum these appellate delays have resulted in adverse consequences to the DEQ in the following three ways. The DEQ has had the uncertainty of a potential multi-million dollar damage award hanging over its head and the taxpayers' heads for nearly a decade. Second, the time and state resources required from the DEQ and the Attorney General's office as a result of this litigation has been substantial over the nearly decade time period and finally, by merely enforcing the state's policy as reflected in our wetlands statutes, the DEQ is consistently exposed to needless financial risk if a person is denied a wetland permit pursuant to the Wetlands Protection Act.

JUSTICE CORRIGAN: Thank you Mr. Burton. Are there any questions? We invite you as well to submit written remarks if you would like and you are not limited to 3 minutes in those remarks. Thank you. Items 1, 3 and 9, Mr. Scott Bassett is appearing.

MR. BASSETT: Good morning. If I could address Item 1 first, on that item I am representing the appellate practice section of the State Bar. The section did discuss this proposal at length at its council meeting on June 22 and did submit a letter dated July 11 both to the State Bar with copies to Chief Justice Corrigan and to the Clerk of the Court outlining our position. I will just summarize it. The section opposes these amendments. The section council has a wide variety of practitioners making up its

membership: plaintiffs' representatives, defendants' representatives, criminal, civil. And we were unable to determine even with that broad-based membership that there was a significant body of cases that needed what could be in practice an extraordinarily broad court rule amendment that would have significantly unintended consequences. We need to recognize that challenges to statutes to rules on a constitutional basis can happen in a wide variety of cases not just the types of cases the first two speakers alluded to. We see them in my practice area of family law all the time, in juvenile cases. We see them occasionally on child support issues, on parenting time issues. If in fact we were to notify the Attorney General on cases like that and invite their participation the entire trial court system could conceivably grind to a halt. Many of these issues are raised, for example, on motion call under the court rules a motion can be filed with 9 days advance notice, 7 days if delivered by hand. How could we conceivably make a rule like that work without slowing the process of very-time sensitive cases through the system, family cases, criminal cases for example. The appellate practice section's view is that unless we can see statistically that there are more than just a handful of problematic cases in a few limited substantive areas that this type of broad-based amendment should not be adopted by the Court.

JUSTICE CORRIGAN: Do you want to speak on items 3 and 9 as well as long as we have you on your feet. Item 3 is whether to provide an appeal of right from an order denying an asserted defense of governmental immunity.

MR. BASSETT: And this was another issue that the appellate practice discussed at its June 22 council meeting, also submitted a letter dated July 11 to the State Bar with copies to the Chief Justice and to the Clerk of the Court. Our concern is that even though this is perhaps intended to be an analogy to the federal rule providing for this type of procedure, the proposed amendment is significantly broader than the federal rule. For one thing the federal rule is limited to governmental officials and their immunity defense and it's limited to rules of law. Our concern with the broad base of this proposal is that you very well, number one, if you're creating an appeal by right are you then running the risk that if the governmental unit doesn't appeal, haven't appealed by right, have they waived that issue.

JUSTICE CORRIGAN: I'm going to give you one more minute to finish up comments on this, okay Mr. Bassett, one more minute.

MR. BASSETT: And the risk then is are we going to force governmental units to appeal and increase the docket burden on the Court of Appeals in cases where they may not feel it's necessary to do that short of a final order but they have been granted a right of appeal and they don't want to run the risk of waiver. So there is a concern there. There is also a concern that you'll be seeing interlocutory appeals where in fact there may

be some genuine questions of fact and if there's going to be a proposal like this it really should be limited strictly to legal issues. So the appellate practice section does oppose this amendment.

JUSTICE CORRIGAN: Can I ask you with regard to Item 9 which is the rule change on appeals of right involving domestic relations actions, are you just speaking to support it?

MR. BASSETT: That's correct and actually I put on my family law section hat for that one. That was, what we always believed was an oversight and its corrected and we would like to see that retained.

JUSTICE CORRIGAN: Very well, no other comments have been received other than yours so thank you very much. We'll return to Item 2 and we have Carol Bambery from the Department of Natural Resources.

MS. BAMBERY: Thank you. I'm the legislative liaison for the DNR. The DNR is strongly in favor of the Court's adoption of the proposed court rules providing that if a preliminary injunction is issued a trial on the merits must occur within 6 months and a decision by the trial court within 56 days. The DNR has submitted its written testimony today setting forth several examples for the record. A couple of those cases indicate that the litigation actually dragged out for 15 years in one case and 19 in another. However what I wanted to talk about today was a more current case that was decided by this Court in 1993 and that's House Speaker v Governor and it's an example of even when courts act as quickly as they can, any delay in a judicial determination can result in adverse consequences for a state agency and the public. On November 8, 1999 (sic) Governor Engler issued Executive Order 199131. It abolished the current DNR and established a new DNR. It also abolished 18 boards and commissions that had been established by the Legislature. By the terms of the Executive Order it was to become effective in 60 days. Several environmental groups, the Speaker of the House and members of the Legislature filed a complaint in December of 1991 and asked for an injunction, arguing that the order that the Governor had entered had exceeded his executive authority under the Constitution, Art. 5, Sec. 2. The trial court concluded in July of 1992 that the executive order did violate separation of powers and it was not authorized by the state Constitution. The Court of Appeals agreed in August of 1992 and then this Court reversed both trial and appellate court decisions over a year later. In this case the very essence and the duties and responsibilities of the DNR were put on hold pending appellate review. The Department's chain of command was in turmoil during the litigation and decision making on the issues that were important to the citizens of Michigan was in utter confusion because we didn't know who was to make the decisions--if the boards and commissions were making the decisions or if in fact they

were even in existence. Therefore the Department strongly supports the changes in the court rules that would give any tightening of the rules that would assist an early resolution of legal disputes that enables the state agency to function more effectively and efficiently to carry out its missions and duties.

JUSTICE MARKMAN: Ms. Bambery, has it been your view that there are inadequate opportunities for appeal or inadequate opportunities to seek superintending control in the kind of cases that you're talking about. Why have they dragged on so long.

MS. BAMBERY: If you look at one of the cases that I have mentioned in my brief on page 4, the case of Platt Lake Improvement, and this was a case that was started in 1986 and the preliminary injunction was issued then in 1999 and it was actually just last year, year 2000, that the court concluded the matter and it was simply a matter of using delays, using appeals, using motions to delay implementation of court order. So we as a Department have rarely used I believe the superintending control.

JUSTICE MARKMAN: Did you seek to invoke the assistance of the appellate courts in this process at all.

MS. BAMBERY: Not in that case, no.

JUSTICE CORRIGAN: Any other questions? Thank you Ms. Bambery and we appreciate your submission of written remarks as well. Thank you.

Item 3: Whether to provide an appeal of right from an order denying an asserted defense of governmental immunity

JUSTICE CORRIGAN: Is Lorraine Dolan here?

MS. DOLAN: Good morning. Lorraine Dolan. The reason I'm here this morning is to discuss the proposed amendment to MCR 7.203. I believe this proposed amendment is an excellent one that this Court should adopt for one simple reason. It works. I'm not going to discuss the public policy behind the enactment of governmental immunity in this state except to emphasize that governmental immunity is immunity from suit which is a question of law for the trial courts. In Michigan trial judges all too often fail to decide the question of immunity in favor of allowing a case against a public entity particularly one with compelling the images to go to the jury rather than make the difficult legal decision even when it is clear that as a matter of law governmental immunity applies. Such rulings fly in the face of the Legislature's intent, needlessly protract litigation and increase greatly the settlement value of a case. The proposed amendment alleviates these problems and does not guarantee an increase in the number of

appeals. I base my conclusions on my experience managing municipal litigation in the state of Ohio where this rule was in effect. In Ohio the trial courts faced with the threat of an immediate appeal were far more likely to appropriately grant the defendant's motion for summary judgment based upon governmental immunity even in the face of plaintiff's catastrophic injuries. Quite honestly I was often shocked by the various courts' rulings granting immunity to the public entities. My shock was not because the rulings were incorrect, on the contrary they were correct. These judges had the courage to make the correct ruling when faced with the threat of an immediate appeal. Another point that I believe bears noting is the fact that in Michigan when a municipality's motion for summary disposition based upon immunity isn't denied, settlement demand and the value of the case significantly increases. Plaintiff has every reason to increase the demand knowing the entity faces the cost of the lengthy pretrial process as well as a trial and likely verdict. This has the untoward effect of either not fostering settlement at all or fostering an unreasonably high settlement. In Ohio the denial of a motion for summary judgment did not have this effect. The plaintiff, faced with the cost and time of an appeal as well as the legal hurdle prevailing before an appellate court often kept the demands reasonable, demands that were often accepted before the case was ever appealed or tried. While some may argue that the number of appeals will increase as a result of this proposed amendment, I believe this proposed amendment may actually have the opposite effect. If the trial courts properly apply immunity and grant the entity's motion for summary disposition when appropriate the number of cases tried will decrease as will the number of cases appealed. Further, when a motion is denied the settlement demands will not escalate and cases will often settle for a reasonable amount, again decreasing the number of cases tried and appealed. Thank you for giving me the opportunity to speak to you.

JUSTICE TAYLOR: How does the Ohio procedure work.

MS. DOLAN: Very similar to the way it would be implemented here. When the motion for summary judgment is denied, I think it's 28 days that the defendant has to appeal.

JUSTICE TAYLOR: The government has an appeal of right.

MS. DOLAN: Correct.

JUSTICE CORRIGAN: When it's immunity from suit is it not the fact that the lawsuit itself is the harm so that whether you're supposed to be in court ought to be entitled--and would you call that an appealable final order.

MS. DOLAN: Yes.

JUSTICE WEAVER: Are you working in Ohio or Michigan?

MS. DOLAN: I was managing municipal litigation, company I worked for underwrote in five states, not in Michigan.

JUSTICE WEAVER: But you compare the Michigan situation to Ohio.

JUSTICE TAYLOR: In those five states did they have a procedure like this.

MS. DOLAN: Ohio was the only one, and of all the five states I thought this rule was the most compelling of any of those states and worked. It was the best way to decrease the number of suits that were pending.

JUSTICE WEAVER: Is the proposed Michigan the same as Ohio's rule?

MS. DOLAN: It is merely identical. It's a statute in Ohio but it's the same wording. It was part of the tort reform act.

JUSTICE KELLY: Ms. Dolan, what company do you work for.

MS. DOLAN: I don't anymore, I'm about to have a child so I do not work there anymore but the name of the company was American Risk Pooling Consultants.

JUSTICE KELLY: Are you representing that company here today?

MS. DOLAN: I am not.

JUSTICE KELLY: You're speaking for yourself.

MS. DOLAN: I am.

JUSTICE YOUNG: Ms. Dolan, how do you respond to Mr. Bassett's suggestion that by making an appeal of right on a determination to deny an immunity defense, you put the governmental entity at risk of either immediately filing to preserve that right of appeal or waiving it.

MS. DOLAN: I disagree. Based on my reading of the proposed amendment I did not find that it was mandatory. I believed, it appeared to me that it was discretionary and I do not believe that puts the entity to risk at all considering that when

you weigh the options the options of going through, you know for these entities that, some of them are very small and to have two people sit through an entire trial process and a trial can be very catastrophic for that small public entity, small village or small township and when you weigh the two factors I don't see any comparison whatsoever.

JUSTICE WEAVER: Are you living here in Michigan?

MS. DOLAN: I am.

JUSTICE CORRIGAN: And admitted to practice in Michigan as well, correct.

MS. DOLAN: Yes.

JUSTICE MARKMAN: Are individual government employees encompassed by the Ohio statute?

MS. DOLAN: Yes.

JUSTICE CORRIGAN: Anything else? Thank you Mrs. Dolan we appreciate your coming here today. I'm going to call on Joe Yekulis. Briefly, Mr. Yekulis is currently, I believe, the president of the Michigan Association of Counties.

MR. YEKULIS: Yes, ma'am. Good morning, Your Honors. As you say, I am the president of the Michigan Association of Counties and the Michigan Association of Counties is an organization that represents all of Michigan's 83 counties. I come before this Honorable Court today to comment on proposed Court Rule 01-07. The proposed rule would be very beneficial to the members of our association. The assertion of governmental immunity as a defense at the trial level is a viable tool in this litigious society. However, under present court rule, in our case counties, can raise the defense when a lawsuit is filed. If the defense is kicked out at the trial level there exists no remedy except to go through the complete trial process. If a verdict is rendered on behalf of the plaintiff in the lawsuit the county can appeal the decision to the Court of Appeals and raise the defense of governmental immunity. The proposed court rule change would permit counties to have the ability to request an interlocutory appeal immediately to the Court of Appeals. This rule change would be both beneficial to the plaintiff and the defendant in the legal proceedings. The MAC board of directors at its December 7, 2001 meeting last Friday passed a resolution in support of proposed rule 01-07. The rule would assist us in the defense mechanism as well as help free up court time and dockets, provide economic benefits and continue to carry out the justice system in the state of Michigan. So essentially, when it comes down to it for the Michigan Association of Counties,

anything that saves counties money in the spirit of maintaining due process is all right with us. Thank you for the opportunity.

JUSTICE CORRIGAN: Thank you for coming. Do you have any questions, Justices? Thank you Mr. Yekulis. Now we turn to Item 4.

Item 4: Should the authority to appoint counsel, fiduciaries and other representatives for trial court proceedings be shifted from individual judges to a local non-judicial official. File No. 01-10.

JUSTICE CORRIGAN: Is Matthew Able here? Honorable Joan Young, Chief Judge of Oakland Circuit.

JUDGE YOUNG: Good morning, may it please the Court, I'm Joan Young, chief judge of the Oakland County Circuit Court and I'm here today to discuss proposed administrative order 01-10. I would refer you all to a letter previously sent to the Clerk of the Court dated September 26 signed by me and by the chief judge of the Probate Court, Linda Hallmark. Additionally there was a letter sent to each of the Justices dated November 26 from Judge Richard Coon. They both address the same issues. First off, let me say that I have no problem whatsoever with the requirements of disclosure that are proposed in this rule. That information which we currently collect we would have no difficulty disclosing and in fact we have made such information available over the years to the media and to any other member of the public who required it. I do want to elaborate on two points that are addressed in these two letters that I feel are of significant importance. First, with respect to some of the administrative requirements, specifically that a local non-judicial appointment authority be responsible for these appointments, I would point out that the Circuit Court has since 1997 been operating under an administrative order approved by the State Court Administrator 1997-2 which does implement a rotating appointment system for offenses carrying a maximum penalty of five years or less. There are approximately 2,500 of these appointments on an annual basis and this occupies the time of one full-time person to achieve this task. There are significant other appointments that are not covered by this system. There are about 1,500 cases that are maximum penalty of more than five years. There are probate, estate and mental health appointments in the amount of about 1,700 appointments. Probation violations of approximately 1,345 cases. That's a little over 6,000 additional cases and I would suggest to you that we would require at least two, perhaps three additional administrative staff to manage a rotating appointment system on those cases. Now these numbers only reflect the appointments which result in court-ordered payments. We obviously have to issue a 1099 on all payments we make through the county and so we can record those quite easily. But it does not include, and I cannot give you numbers on court-appointed cases that involve guardians, guardians ad litem, conservators, receivers,

court-appointed experts and others who are paid out of funds from some other source, perhaps the party's funds, perhaps some other source. I don't collect this information currently and it would require a significant administrative change to collect the information so that it could be disclosed. The only other issue that I would like to raise is that sometimes judicial involvement in the appointment process is not a bad thing. For example, if I have a case before me on an appointment of a guardian of a minor child quite frequently there are not attorneys present, I have only the parties present, and no one to truly give me some independent information about the best interests of the child. In order to speed the process along and to avoid having parties come back I will frequently appoint from the bench a competent attorney who may be present in the courthouse so that interviews can occur on the spot and very possibly in many cases the cases are resolved on that day, avoiding the necessity of another hearing.

JUSTICE CORRIGAN: Thank you Chief Judge Young. Any questions.

JUSTICE TAYLOR: Yes, Judge Young I have a question. I think knowing the Court is anxious to burden the lower courts with all kinds of paperwork and having to hire people and so on, how difficult would it be to make known to the public by filings in the clerk's office and so on amounts of money which are paid from the public funds for appointed lawyers of any kind in any court. Don't all these people get sent 1099's.

JUDGE YOUNG: Precisely my point. I can provide that information without any difficulty at all.

JUSTICE TAYLOR: So if we enacted a rule that said annually with the filing of the 1099 the county entity or perhaps some other appointing entity that's the government would have to make these things public, would that impose any great burden.

JUDGE YOUNG: That would be no burden at all because we have the capacity to do that, we have done that over the years. We just recently discontinued a report on a quarterly basis that provided that information because no one was interested.

JUSTICE TAYLOR: I don't know that that's done widely.

JUSTICE WEAVER: Is that true for every county or Oakland.

JUDGE YOUNG: I don't know about other counties.

JUSTICE TAYLOR: I think Oakland does that but I don't know that others do. We've also heard testimony that in Macomb County they have a system of

appointment which I think they're very proud of and I believe it's a little bit different than yours. Are you acquainted with that system?

JUDGE YOUNG: I'm not.

JUSTICE MARKMAN: Judge Young, when you indicate that this would be a manageable responsibility, that is the disclosure, are you including probate appointments as well or are you making a distinction in that regard.

JUDGE YOUNG: With respect to the amounts of money paid to court-appointed people?

JUSTICE MARKMAN: Yes.

JUDGE YOUNG: That would be no difficulty at all because it's still the county accounting office that issues the 1099's for all court-appointed individuals who receive funds from the county, so that would be no difficulty.

JUSTICE MARKMAN: And this would include all kinds of appointments even including expert appointments, is that correct.

JUDGE YOUNG: If they are paid through county funds, that would be the distinction I would draw.

JUSTICE TAYLOR: We've gotten comments that having disclosure as to conservators and guardians where they're being paid out of the estate as opposed to out of public money, that this would run contrary to the sort of progressive notion of independent probate. That this would require courts to get back involved in looking at what conservators get, even in the circumstances where everybody in the estate agrees the conservator should get that. I know you were a probate judge for years. Can you discuss that. Because the problem we have is we have some of these very highly publicized cases where conservators are getting large amounts that the public are confused about. Can you talk just a little about that Judge Young.

JUDGE YOUNG: Well where I was approving an account on the record, frequently there would be waivers and consents from all of the interested parties, I still as a perfunctory matter reviewed it and approved it. But it was really just an administrative function at that point. But that's not something we record. It would be available as a public record but

JUSTICE TAYLOR: Somebody would have to come in and ask for the

Jones file or whatever.

JUDGE YOUNG: Exactly.

JUSTICE YOUNG: Judge Young, do you read the rule as proposed to require the reporting of fees paid other than at public expense.

JUDGE YOUNG: Yes, that is the way I read it.

JUSTICE YOUNG: Really.

JUSTICE WEAVER: You are in favor of this proposal or you are not.

JUDGE YOUNG: I have no problem with the disclosure requirements. What I do have a problem with is the extension of the non-judicial appointing authority beyond what we currently have because of the administrative problems and costs that it would incur.

JUSTICE WEAVER: So you do have a problem with parts of it.

JUSTICE CORRIGAN: What about working toward crafting a system understanding it's expensive now, but a directive by this Court to work toward the crafting of such plans and the orderly expansion of such plans. Is it not a sound matter of administration of the courts to require courts to work in that direction.

JUDGE YOUNG: I have no difficulty examining it carefully and making decisions on various aspects of the rule that would benefit the appointment process, would conserve taxpayer funds, would work towards the efficient administrative of justice, I have no problem with that.

JUSTICE CORRIGAN: The question is the financial hit from what is required now.

JUDGE YOUNG: And that is a significant concern now.

JUSTICE CORRIGAN: But I think what we saw here as a whole in that we have standards for felony appointments but we have all these sort of a patchwork quilt throughout the rest of the state or nothing at all in terms of the appointment system and it can be subject to abuse.

JUSTICE CAVANAGH: Judge Young, for cases involve more than a

five-year cap, how does Oakland assignment process work.

JUDGE YOUNG: The assigned trial judge assigns the attorney.

JUSTICE CAVANAGH: If they get assigned the case they pick the attorney.

JUDGE YOUNG: Yes, but let me point out, we attached the rule to the letter that we sent to you in September and it does point out that attorneys have to qualify to be assigned to cases of a certain level. We have four levels, 1 through 4, 1 being the highest. So the assigned trial judge could only appoint from level 1, for example, on a murder case.

JUSTICE CORRIGAN: And do you have a requirement that for example a judge cannot appoint a given attorney more than 10 times a year or any numeric restriction.

JUDGE YOUNG: We don't have a numeric requirement, no.

JUSTICE MARKMAN: Judge Young, on the disclosure issue I know that you're not conversant with the procedures in all the other counties in Michigan but is there anything at all distinctive about the procedures or the record-keeping policies in Oakland County that allow you to do this or is it merely the fact that you're obligated to file the 1099 forms.

JUDGE YOUNG: Well many years ago, maybe about 20 years ago, we created a report that allowed us to report on a quarterly basis what judge had appointed what attorneys and how much they had been paid. It is an existing report.

JUSTICE MARKMAN: Would you believe that there are any barriers to any other moderate to large counties in Michigan putting the same procedures together in fairly rapid order.

JUDGE YOUNG: Depending on their computer system, because ours is all driven by the data that is collected on our computer system.

JUSTICE YOUNG: Every county presumably is following federal tax law, is generating 1099 forms. What would be missing if they haven't done what Oakland did is linking who caused the 1099 to be issued. The name of the judge.

JUDGE YOUNG: Correct.

JUSTICE YOUNG: Let me ask you, if the order was limited to appointments that involved public expenditures, how would that affect your position.

JUDGE YOUNG: In terms of my support for non-judicial appointing authority for everything?

JUSTICE YOUNG: Yes. That's the part that you're really having is the non-judicial appointing authority beyond the--

JUDGE YOUNG: And I guess I would urge some discretion for involvement of a judge in the appointment process for the example that I just gave you and there are many others and I don't want to burden you with those.

JUSTICE YOUNG: Well let me ask you a different question then. How do you as chief judge of the Oakland County Circuit Court assure yourself that your colleagues are not misusing the discretion that they have to appoint.

JUDGE YOUNG: Well we have a circuit court criminal appointments committee that is made up of lawyers, judges and administrators that review the appointment process. As I indicated, we do have the reporting capability so that when we did issue the report on a quarterly basis peer pressure was sometimes a good way of letting everybody know who was getting appointments from what judge and so forth, and that worked very well. But I haven't really heard a lot of complaints from lawyers or the public that the process isn't working.

JUSTICE YOUNG: It's a little hard, if the issue is I don't get appointments unless I am supportive, it's a little hard to make those public isn't it. If a lawyer feels under a compunction to support a judge in order to retain appointments, that's a pretty hard complaint to make anywhere, isn't it.

JUDGE YOUNG: Well I guess I don't believe that I have seen the use of the appointment process in the election of judges.

JUSTICE YOUNG: That's why I asked the question how do you personally monitor as chief to make sure that

JUDGE YOUNG: I don't really have a way to monitor it, if that's what you mean. I don't have a specific way of monitoring it.

JUSTICE YOUNG: You don't think it's an issue though.

JUDGE YOUNG: I've been in Oakland County for 22 years as an administrator or a probate judge and a circuit judge and the issue has really not been raised to any significant degree.

JUSTICE CORRIGAN: Thank you Judge Young, we appreciate you coming today.

Item 5: Proposed revisions to the appellate assigned counsel system.

MR. FLANAGAN: Your Honors, I'm Terry Flanagan and I'm appearing here not in my role as the administrator of the appellate assigned counsel system but in my role as a private attorney. My commission, the appellate defender commission, is already on record reluctantly supporting the idea of rescinding the minimum standards. I'm here in my own behalf just to recommend that the Court not adopt the proposal. The minimum standards have been in effect now for going on 20 years as of February 1, 2002. They probably are in need of updating. Anything that is that old does need some tweaking, does need some amendments. But the fact of the matter is, they have been working and working well. They have served not only as a guideline for identifying what role appellate counsel must play, they've also served as a took for MAACS (?) to gauge the performance of the conduct of its counsel. Three minutes isn't enough to even get close to this so I just want to just address one aspect of it and that's the accountability aspect and how these standards promote accountability and how accountability is necessary for determining the proper expenditure of public funds. It's difficult to have accountability without standards against which performance can be measured. The standards promote safeguards for the expenditure of funds by defining the scope of the services that are going to be provided by the attorney. They take it from A to Z with the exception of minimum standard one which is kind of a catchall. The other standards right in order tell counsel what is required of him on a minimum basis. And primarily they also not only help the counties determine how much an attorney should be paid, but they also help MAACS gauge the performance over the years, and I've got to step back a bit and I know I'm running my time here. I have a unique perspective I think I have to offer here. I'm not here as a MAACS administrator but I have 27 years experience in this area, 10 as a SADO defender, 4 as a commissioner with your Court, although maybe only Justice Cavanagh would remember that, and the remaining time at MAACS. All this has been involved in the processing of criminal appeals since the commissioner workload was 50% criminal appeals. I believe the standards have really functioned well over the years and I also believe this is the first time that we have had a Supreme Court consisting of 7 Justices who have all been members of the Court of Appeals. I might be wrong on that but I believe that's the situation. You have all seen shoddy performance in civil cases and in criminal cases.

JUSTICE YOUNG: And from MAACS attorneys.

MR. FLANAGAN: And from MAACS attorneys. Fortunately we have been able to involuntarily remove almost 80 attorneys over the 14 years I have been there based on substantial violations of the minimum standards. MAACS will continue to be able to do what we need to do by the utilization of the advisory principles that the appellate defender commission has proposed as an alternate.

JUSTICE YOUNG: Are you suggesting that the only way to evaluate attorneys is on the basis of these standards.

MR. FLANAGAN: It is a primary way, yes it is. It is not the only way. There are many ways to--I can't say that standard 16 says you should request and appear at oral arguments. It doesn't talk about the level of competence displayed during your presentation at orals, but they do provide a great gauge. And I do believe the Court is sending a message by rescinding these.

JUSTICE YOUNG: Well yeah, tell me why the standards of professional conduct are insufficient guides for professional--

MR. FLANAGAN: They are so insufficient they apply to everyone. Every lawyer in this room is bound by the rules of professional conduct. They are general. They are not tailored to any specific area of practice. The minimum standards build on the general nature of the rules of professional conduct and then move on to the specific.

JUSTICE CORRIGAN: Mr. Flanagan, what's the matter with the advisory principles that you've generated.

MR. FLANAGAN: There is nothing the matter with them. MAACS will be able to perform the same function of gauging the function of attorneys with them.

JUSTICE CORRIGAN: Do you think that the 1981-7 standards that are now 20 years old and contain references to law that is no longer good law should be retained?

MR. FLANAGAN: I think they should be tweaked. I was here a year ago in November about when 00-32 only involved Standard 11.

JUSTICE CORRIGAN: Not speaking in your personal capacity but as the director of MAACS, haven't you had the opportunity to tweak them over the period of

time of your leadership and hasn't the tweaking resulted in the advisory principles.

MR. FLANAGAN: Yes but those advisory principles were reluctantly arrived at after a series of MJA proposals and

JUSTICE YOUNG: Reluctantly arrived at. You wouldn't have done anything on your own, I take it.

MR. FLANAGAN: Justice Young, there was never a problem related to us until the MJA first formed its task force under the leadership of then Chief Judge Corrigan.

JUSTICE YOUNG: Let me ask you the question. Why aren't your advisory principles sufficient.

MR. FLANAGAN: They are sufficient. They will be sufficient.

JUSTICE YOUNG: Then why do we need these.

MR. FLANAGAN: Because it sends a message. First of all, it's been in existence for 20 years. They can be tweaked because as Chief Justice Corrigan said, especially Standard 11 probably is not consistent with federal and state law these days. But I don't think they need to be thrown out. It's kind of like the baby with the bath water situation.

JUSTICE KELLY: What message would we be sending.

MR. FLANAGAN: That you don't care. That's the message I think will be sent. That this is an area of practice that we're going to get rid of the specific standards that have worked pretty well. Send them back and say the rules of professional conduct apply. Well of course they do.

JUSTICE YOUNG: Who hires MAACS attorneys, who retains them.

MR. FLANAGAN: Indigent defendants. No one hires them, they are

JUSTICE YOUNG: Well but isn't the pool of people who are MAACS attorneys derived by you. Don't you supervise them.

MR. FLANAGAN: Yes we do.

JUSTICE YOUNG: They why isn't this your management problem. Why can't you issue the standards you think are appropriate like these advisory principles. Why must this be a standing court order.

MR. FLANAGAN: Well the appellate defender act of

JUSTICE YOUNG: I understand how it came into being. I'm saying now why must it be. When this is essentially a supervisory kind of issue.

MR. FLANAGAN: Well it will make supervision a little more difficult but it won't hinder us.

JUSTICE YOUNG: Because of your rules?

MR. FLANAGAN: Without the imprimatur and the stamp of approval by the Supreme Court, yes it will make it more difficult. No it will not make it even close to impossible. We will function well.

JUSTICE CORRIGAN: In regard to the letter that was sent by Judge Howard to this Court which represents that John Scott, then the ADC chair, joined in asking our Court to revise the existing standards and rescind the minimum standards and replace them with the Michigan Rules of Professional Conduct, you're saying now you are here in your personal capacity but in your capacity as director of MAACS you are not rejecting that on behalf of the agency, are you.

MR. FLANAGAN: No I'm not.

JUSTICE CORRIGAN: Or is that how it still stands. The JMJA and the appellate defender commission jointly ask us to rescind these standards and substitute them. And the cast that you put on it in terms of "reluctantly" is your own cast, is it not.

MR. FLANAGAN: No, I believe it's the cast of the Appellate Defender Commission as stated in Chairperson Joe Olsen's letter to you of January 25, 2001 which states in no uncertain terms that this was not a decision that was reached without much contemplation and much pressure, quite frankly. And I believe that Judge Howard's

JUSTICE YOUNG: Is it the position of the Commission or not.

MR. FLANAGAN: It is the position of the Commission, arrived at reluctantly.

JUSTICE MARKMAN: Mr. Flanagan, I've got three very short but related questions. Would you object to clarification of the standards to the effect that they do not represent the minimum constitutional requirements for the effective assistance of counsel.

MR. FLANAGAN: I would not object to that shaping or phrasing.

JUSTICE MARKMAN: Would you object to clarification of the standards that violation of the standards per se does not constitute a basis for grieving counsel.

MR. FLANAGAN: I would say also again the same way, that that would be an appropriate take on the matter, however I don't think that's ever been the situation that a violation of the standards per se has ever been treated by the Attorney Grievance

JUSTICE MARKMAN: So you wouldn't object to a clarification of that then.

JUSTICE CORRIGAN: But does that cure the problem, because isn't the thing that the MJA task force was trying to arrive at, the problem that lawyers were being grieved at the Grievance Commission for violating the standards, even in cases where they had won the appeal. And that is the practical problem that the standards impose on lawyers.

MR. FLANAGAN: Without answering your question directly, I don't believe that the rescission of the standards will reduce an iota the amount of grievances received by the Attorney Grievance Commission.

JUSTICE YOUNG: But they won't be based on violation of the standards.

MR. FLANAGAN: They will be based most primarily, about 50% of them, be it trial or appellate, on violation of MRPC 1.4A which requires that counsel communicate reasonably with their client and keep them aware of the status of the case. My conversations and meetings with Robert Agasinski of the Grievance Administrator over the last couple of months, he has told me that 50% of their cases involve attorney-client relationship problems. So the only one that really deals with that in the minimum standards is Standard 17. You eliminate all the standards you're still going to have all these relationship grievances based on 1.4A of the MRPC. So I don't think it's a big problem and it has been perceived as a larger problem that it is, and quite frankly grievances are down because the amount of appeals are down because new admits to the Department of Corrections are down.

JUSTICE MARKMAN: Can I ask you my third question now. Would you object to clarification of the standards that they are to be interpreted flexibly. If the standards say you have to visit your client in prison, if the response is well I talked to him on the telephone, that was perfectly adequate. Would you favor that rule of reason as an informing principle of the standards.

MR. FLANAGAN: I would. And in fact our advisory principle that essentially replaces the mandatory visit standard which is Standard 3 is essentially couched in those terms. The onus is put on the attorney to make the informed decision what is best for each individual case. There is much flexibility built in.

JUSTICE YOUNG: Can I just ask you, why didn't you submit as an alternative to this proposal rules or standards that are perhaps more nuanced than these are, like your advisory principles. If you felt that the Court needed to be on record as imposing essentially work rules for MAACS attorneys that are different in kind in some way from the canons of professional ethics, why didn't you propose that.

MR. FLANAGAN: I guess we did. We wrote, in response to a letter from Chief Commissioner Lynch, which was made in response to my appearance here last year with regard to Standard 11

JUSTICE YOUNG: Is that as a proposed alternative to these standards.

MR. FLANAGAN: Yes. Joseph Olsen, our chairperson, wrote to Chief Justice Corrigan with copies to every one of the Justices that show what our advisory principles are so it wasn't a direct use these instead of but it was the equivalent.

JUSTICE CORRIGAN: How about repackaging them and resubmitting them as revised minimum standards.

MR. FLANAGAN: That would be wonderful. I would be happy to report that back to my commission.

JUSTICE CORRIGAN: Well I will speak for myself on that, I'm just speaking for myself right now, that seems to me something that we might consider. We'll talk about it. Thank you. Any other questions?

Item 6: Proposed Amendment of Canon 7 of the Michigan Code of Judicial Conduct.

JUSTICE CORRIGAN: Whether to forbid candidates for judicial office

from contributing directly or indirectly to an endorsing organization in return for an endorsement. We have Jamie Martinez. Is he available? All right. Representative LaMar Lemmons. Is he present? Very well. Move on to Item 9.

Item [8]: Proposed Amendment Renumbering of various provisions of the Michigan Court Rules

JUSTICE CORRIGAN: Whether to amend several rules that govern matters no longer within the jurisdiction of the probate court. Excuse me, that was Item 8. Item 9.

Item 9: Amendment of Rule 7.203(A)(3)

JUSTICE CORRIGAN: Whether to retain the recent amendment that makes this court rule applicable to all domestic relations actions involving post-judgment orders affecting the custody of minors. Is Anne Argiroff here.

MS. ARGIROFF: Good morning. I know Scott Bassett spoke about this briefly earlier. Again I'm speaking in support as a family appellate attorney in support of the rule change. I've spoken with other family law appellate attorneys who also support this rule change. The one question that did come up in my discussions with some of the other attorneys was is there some other mechanism besides challenging inadvertent court rule problems such as this besides raising the problems in cases. We didn't know if there was going to be a committee set up to discuss in our case family law court rules. Possible problems with those court rules. Inadvertent problems through subsequent changes of those court rules, or if there is some other mechanism that we can get these problems before the Court without having to go through the more cumbersome problem

JUSTICE CORRIGAN: There's a standing--I'll just answer this now and it's really not on point but there is a standing family law group that is working on rules revisions and I would just suggest that you communicate through our Commissioner's Office with that. Commissioner who is assigned to (inaudible).

MS. ARGIROFF: Okay, thank you very much.

JUSTICE CORRIGAN: Very well. Thank you. Again on Items 9 and 11 Murray Davis of Dads of Michigan. And I understand you're here on Item 11 as well Mr. Davis, that is on court reorganization.

MR. DAVIS: Yes, Your Honor, I'd like to address Item 11. I'm not prepared for 9.

JUSTICE CORRIGAN: All right, we have only heard of favorable comments on Item 11. You're welcome to submit something in writing if you'd like to on Item 9.

MR. DAVIS: I've just done so, Your Honor. Good morning, I'm Murray Davis, founder and executive director of Dads of Michigan. I want to thank you for this opportunity to appear before you distinguished body to present amended public testimony to our September 13 submission on two points regarding item 11. First, there is a growing public concern regarding investigative reports showing Michigan's current child support base model guidelines, also known as income shares, to be significantly flawed, resulting in erroneous, inequitable and over-assessed awards. This in turn results in increasing arrearages and poverty among custodial and non-custodial parents alike. Further, the current quadrennial review process currently in progress in our opinion will essentially guarantee that this situation will continue for another four years. Second, family courts and friend of the courts are failing to enforce parenting time and compliance violations equitably, while non-stipulated parenting time recommendations continue to be ordered by the family divisions. These situations appear to violate parents' equal protection and due process rights and focus should be included in your reform efforts to this situation. Our current research shows that these violations are indeed rampant among selected family division courts and we assume that they are occurring to some degree elsewhere in all courts in the state of Michigan. Our specific recommendations are in fact contained in our written testimony. Finally, I'd like to extend a cordial invitation to each of the Justices to attend our first annual awards banquet on Saturday, January 12 in Detroit. I'll yield any remaining time for your questions.

JUSTICE YOUNG: Can I just ask a question. Why do you believe that the quadrennial evaluation for shares is running amuck.

MR. DAVIS: Well we feel that first off the award was awarded to a vendor who in fact is the author of the current 15-year old base guideline.

JUSTICE CORRIGAN: Is that PSI?

MR. DAVIS: Yes, ma'am.

JUSTICE CORRIGAN: You're on the committee, aren't you, Mr. Davis, that is reviewing this.

MR. DAVIS: I am, Chief Justice.

JUSTICE CORRIGAN: Have you made your objections to that process known within the committee.

MR. DAVIS: I have.

JUSTICE CORRIGAN: And what's been the outcome.

MR. DAVIS: The understanding that I have at last when I approached this was that it was the best alternative that presented itself to the bidder's responses. I think, Your Honor, I would agree with that perhaps to a point but I think perhaps what we should be considering is an alternate awards to have an objective review outside PSI's review and there are very, very qualified experts that are able to do that for under $10,000 around the country.

JUSTICE CORRIGAN: Have you submitted those names or suggestions in writing as well.

MR. DAVIS: I have.

JUSTICE YOUNG: What is the process--you have a contractor who is going to create a set of facts based on assumed economic data and then that will drive the formula.

MR. DAVIS: Yes, the bidder's instructions, however, from the SCAO was to actually in our opinion just update and review certain aspects of the current guidelines. It did not include a thorough complete evaluation which we believe is federally mandated.

JUSTICE YOUNG: Is your view shared by anybody else on the committee.

MR. DAVIS: Perhaps, yes, there are several others. However there is a subcommittee of the child support guidelines that has attempted to meet on several occasions but due to lack of quorum has cancelled their meetings. And then again, finally, there is no public input to that process either, unlike other states.

JUSTICE CORRIGAN: Mr. Davis, I will personally look into what you are raising and be back with you on this subject, sir.

MR. DAVIS: Thank you Chief Justice.

JUSTICE CORRIGAN: Jim Semerad, Dads of Michigan PAC. All right,

he does not appear to be present. Now we'll turn to Item 11.

Item 11: Court Reorganization

JUSTICE CORRIGAN: Honorable Mary Beth Kelly of the Wayne Circuit Court.

JUDGE KELLY: May it please the Court, I am Mary Beth Kelly. I am the presiding judge of the Wayne County Circuit Court Family Division and as you know and with my thanks, I will become the co-chief judge of the Wayne County Circuit Court in January. The starting point of my proposal is MCLA 600.1021. That section provides exclusive jurisdiction to the circuit court of the defined matters. Those defined matters include child abuse, child neglect and juvenile delinquency matters. Exclusive jurisdiction assumes an adjudication by that court. It assumes that the court has a judge that will hear those cases. In cross-assignments of the probate judges to the circuit court are an ineffective means of effectuating that statutory provision. Even leaving aside whether they are constitutional under Art. 6, Sec. 23, the limited nature of those cross-assignments and the specific purpose for which those probate judges are cross-assigned undermines, in my judgment, the very legitimacy of the family division. We create a family division but then we say we need to bring in these other judges to adjudicate those matters we have just exclusively assigned to that division. No question that many probate judges throughout the state have particular expertise in the adjudication of child abuse, child neglect and delinquency matters. And over the last 5 years we have enjoyed that expertise by eliminating cross-assignments through statutorily changing those probate judgeships into circuit court judgeships we will continue to enjoy that expertise, we will honor the Constitution and we will give the family division the permanence the legislation was intended and the legitimacy it needs within the circuit court to operate going forward. In circuits where only one probate judge exists, the transfer obviously cannot be accomplished consistent with the Constitution. In those situations the Legislature should confer concurrent jurisdiction between the probate court and the circuit court for family division matters. But in circuits with more than one probate judge, where those probate judges are cross-assigned, the Legislature should actually transfer the judgeship. Those are my remarks. My proposal has been provided to you in written form and I'd be happy to answer any questions.

JUSTICE CORRIGAN: Any questions.

JUSTICE YOUNG: Have you had an occasion to talk to all of the associations about your proposal who seem in a state of disarray.

JUDGE KELLY: I have not had an opportunity to present my proposal to

the associations that have presented alternate proposals. I have reviewed the alternate proposals provided by those associations and they fail in my judgment to address what I believe is the central issue, the very legitimacy of the family division. And working in the family division in Wayne County Circuit Court 69% of our caseload is in the family division and 28% of our caseload are these used to be traditional probate--child abuse, child neglect, juvenile delinquency. That's 28% of the entire circuit court docket and it's managed by a division that is regarded as a temporary fix to what legislatively was supposed to be accomplished.

JUSTICE YOUNG: Tell me, in the case of a family court that is populated currently by more judges than merely transferred probate judges, I'm concerned about the phenomenon of the most junior member of the court being assigned, whether that person has an interest or any background frankly, in the matters that used to be previously probate. How does your approach deal with that part of the legitimacy question.

JUDGE KELLY: The probate judges that are cross-assigned by and large have an interest, have experience. By changing their judgeship to a circuit court judgeship they enjoy incumbency. They will continue to serve in the family division.

JUSTICE YOUNG: What about those the surplus need for judicial offices.

JUDGE KELLY: The complaint, so to speak, that the family division is comprised of the most junior judges in a given circuit who don't have the desire to serve in this area, who lack experience in this area, I reject that. I don't think that's true. In the Wayne County Circuit Court, yes, our 10 judges are the 10 junior judges by and large. But the most recent judges that come to this division come with vigor, with enthusiasm, with a fresh approach to the law. We have I think brought much more focus on our family division and I reject the proposition that a judge must practice family law in order to be an able and competent family division judge.

JUSTICE TAYLOR: Judge Kelly, isn't what Justice Young is saying that it's sort of a commonplace at judges' conventions that judges are assigned there on a junior basis, they don't want to be there. As soon as they can get out of there they get out of there. That's the problem we're thinking about.

JUDGE KELLY: That is the problem and certainly that is a perception. Whether it is in fact a problem is what I challenge. I don't know how in the Wayne County Circuit Court that perception is a reality. My colleagues by and large were placed in the family division based on their seniority but they come to, as I have, they're very passionate about this area of the law.

JUSTICE CORRIGAN: Isn't it true that a part of that perceptual problem if it is borne out in fact is also a consequence of the power of the chief judge to make assignments.

JUDGE KELLY: Yes. MCLA 600.23 allows the chief judge to assign specific judges to the family division. And that statutory power is totally separate from MCR 8.110. The legislation says the chief judge should decide who goes in the family division. Now historically the chief judge has exercised that statutory power by allowing judicial preference to prevail so the experienced civil, criminal judges choose to stay there. But there is a statutory power where the chief judge can say experienced judges you will serve in the family division. That statutory power simply isn't exercised.

JUSTICE WEAVER: Can I ask you a couple of questions. I heard you say you have 10 judges now in the Wayne County family division.

JUDGE KELLY: We also have the 3 cross-assigned so it's actually 13.

JUSTICE WEAVER: So you have 13. Under your proposal now would you anticipate there will be more than 13 judges in the family division or just those 3 or 3 slots would be put over in the family division.

JUDGE KELLY: Certainly those 3 probate slots, my proposal is would become part of the family division. So the 3 cross-assigned probate judges doing juvenile delinquency, abuse and neglect would just be circuit judges. Separate and apart we must add judges to our family division in Wayne County so that's peculiar to Wayne County.

JUSTICE WEAVER: Well maybe, maybe not. So your proposal only addresses just giving a different judgeship to those 3 that are presently serving, or 3 slots, I guess.

JUDGE KELLY: That's correct.

JUSTICE WEAVER: Are the judges in Wayne County rotating at the present, out of the 10 that you have, not the 3, or maybe the 3 too from probate. Is there a changing of those judges all the time or

JUDGE KELLY: Well no, Wayne County is unique in that our juvenile delinquency, abuse and neglect is adjudicated from the Lincoln Hall of Justice

JUSTICE WEAVER: I know, I was a probate judge

JUSTICE KELLY: Yeah, those 3 probate judges are not rotating out of child abuse, neglect and delinquency. They exclusively focus on that. We have since the family division plan was created we have devoted domestic relations judges on a part-time basis to the abuse, neglect and delinquency dockets. A week in domestic relations, a week in abuse and neglect. That will change because that too is ineffective to service that docket.

JUSTICE WEAVER: Have you had an opportunity to think about how your plan would say work in Oakland County where you have four probate judges and what is it, 10 or 12 circuit judges. What would you think would happen there.

JUDGE KELLY: Those four judges, if all four of those judges are devoted on a full time basis to the family division, those judgeships would likewise become circuit court judgeships. If those four probate judges, 3 are doing family and one is doing traditional wills and estates administration, for example, that one judge doing the traditional wills, trusts and estate administration would remain the constitutionally mandated probate judge and the probate judges doing the child abuse, neglect and delinquency work, those probate judges would become circuit court judges.

JUSTICE WEAVER: Is it your thought that one probate judge for Oakland County with about 1.2 million people would cover the territory.

JUDGE KELLY: I don't suggest that at all. However those probate judges are allocated, some of those four probate judges are allocated to the family division. My proposal is whatever judge is allocated to the family division, whatever judge is cross-assigned and presume themselves to be a circuit court judge should in fact become a circuit court judge.

JUSTICE WEAVER: So you're not sure how it works there now.

JUDGE KELLY: Well I don't know what their numbers are. With respect to their four probate judges, if two of those probate judges, for example, are devoted full time to family division matters, those two judges should become circuit court judges.

JUSTICE WEAVER: How many probate judges does Wayne have. Do they have 8 or 9 and aren't they losing one perhaps.

JUDGE KELLY: There are 9 probate judges.

JUSTICE WEAVER: And is one proposed to be gone or it is gone.

JUDGE KELLY: Part of the judicial reduction legislation does propose the reduction of one probate judge, but that legislation is pending. My proposal is independent of judicial reduction legislation. My proposal is regardless of what occurs with respect to judicial reduction, the family division legislation needs to be amended to accomplish what is actually set forth with respect to exclusive jurisdiction.

JUSTICE WEAVER: So there are 3 in Wayne that presently are assigned over. That would leave 6 or 5 in the probate division of Wayne County, and I guess 2 or 3 are assigned in Oakland and that would leave one in Oakland.

JUDGE KELLY: The cross-assigned probate judges do not perform judicial functions in Wayne County outside of their family division functions. So there changing the judgeship has no effect. But I do not know about Oakland.

JUSTICE WEAVER: Or Macomb. I guess we were dealing with Macomb, Kent, Washtenaw, Berrien.

JUDGE KELLY: Each county with more than one probate judge does devote probate judges to the family division through cross-assignment if the caseload of that circuit requires. So my proposal does not impact the traditional administration of estates because the judges it addresses are not judges who are doing that work right now.

JUSTICE WEAVER: Assuming they're not doing all of them. I'm just trying to understand your proposal.

JUSTICE MARKMAN: Judge Kelly, let me commend you on one thing in particular that you've done. I'd like to think more about your proposal but I really do appreciate you using the word legitimacy. I think that's a word that's very, very important in this debate and frankly I haven't heard it raised very often. As I see it legitimacy connotes the idea (a) that whatever proposal we adopt is somehow grounded in the language and the traditions of the Constitution and (b) that it's based in democratic principles. And by the latter I mean the idea that the voter who votes for Judge A or Candidate A has a general idea of what that Judge A is going to be doing as he ascends to the bench. As I understand it, your proposal is consistent with that principle. People will have a good general idea of what judges will be doing whom they elect, is that correct.

JUDGE KELLY: That is correct.

JUSTICE CORRIGAN: Thank you Judge Kelly, we appreciate you being here today. Mike Bryanton, president, Michigan Association of County Clerks. Is Mr. Bryanton present? Patty Bender, Michigan Association of County Clerks.

MS. BENDER: Good morning, my name is Patty Bender and I'm the St. Joseph County Clerk. The Michigan Association of County Clerks has maintained an interest in the court reorganization process, family court legislation and trial court projects over the past several years. From a historical perspective, as you're well-aware, the county clerk is constitutionally the clerk of the circuit court. This has remained consistent throughout several constitutional conventions, the most recent being 1963, long after most judges were no longer running the circuit, although they still were in 1970 when I started. In my county anyway. Whatever changes will be made in the future we would hope that the function of the county clerk would remain consistent with our constitutional and statutory responsibility. We have and will continue to work with the courts to provide the most efficient and effective service to our constituents. We realize that change is inevitable but as you know one size does not always fit all, as evidenced by the different ways that the family division has been instituted. It is imperative that we all continue to work towards having a cooperative relationship with the judiciary and the boards of commissioners in each of our respective counties. The county clerks will willingly continue to participate in discussions of court reform. We appreciate that you have included county clerks in the local intergovernmental advisory council. This has allowed open communication between all participants in the judicial system. I would like to add that we especially thank Ann Grooman, John Ferry, Kevin Boling, Jim Covault and others who have always attended county clerks conferences when asked. We appreciate their willingness to keep us informed on any pending or new issues that may affect county clerks. I thank you for allowing me the opportunity to speak to you today. The Michigan Association of County Clerks looks forward to participating in the continuing efforts toward court reorganization. And I might add too that our president, Mike Bryanton, and the president of the MJA, Judge Wilder, have also met on several occasions with members from both groups to keep the communication open. Those have been informal sessions and they have been productive. I would entertain any questions anyone might have.

JUSTICE CORRIGAN: Thank you Ms. Bender. Honorable James Fisher, Fifth Circuit Court, Barry County.

JUDGE FISHER: Good morning, Your Honors, Jim Fisher, Chief Judge of the Barry County Trial Court. I'm here as one of the chief judges of the demonstration trial court projects in the state of Michigan. A number of my colleagues are here this morning. I'm here to speak in favor of our proposal which is a very simple proposal and that is to remove the last sentence of Section 1 of MCL 600.225 which states that assignment of judges must be limited in time and for a specific purpose. We discussed at our meeting where we came up with this proposal several proposals. Merger, for example, of the circuit and probate court. We thought there were a lot of political problems with

that, that it wouldn't be successful and that recent experience had taught that lesson. In addition in our trial courts we have learned that it's not just the circuit and probate courts that are related, there are a lot of efficiencies that can be gained by cross-assignment between district and circuit, for example in felony cases. So we tried to come up with a proposal that we felt would be politically feasible, that would be simple and that would continue the momentum for change or improvement in the judiciary and I think that's reflected in the fact that all three of the judicial associations, thanks to Tom Davis' leadership, have approved our proposal. As far as the legitimacy of it, it's our view that Sec. 23 of the Constitution is limited to situations where there are vacancies in office and I think that view is supported by the number of cases including the Huff and Fleming cases. As far as appealing the democratic principles, it has been our experience that our constituents typically don't have a very good idea of what we do other than the fact that we're judges, we sit in a courtroom and we resolve disputes. So we would ask that you support this proposal because we think it will work. It has worked in our courts, it can work in other courts. We believe it will encourage other courts to pursue court improvement projects and because we think it's feasible. I'd be happy to answer any questions you might have.

JUSTICE CORRIGAN: Thank you Judge Fisher. We appreciate you coming over today. Is Judge Paul Chamberlain present?

JUDGE CHAMBERLAIN: Chief Justice, I'm going to, if there's no objection, yield my spot a moment to the Honorable Mark Wickens of Lake County. I think some questions may have come up at prior hearings and I think you heard enough from me up in Traverse City.

JUSTICE CORRIGAN: Very well. We'll call him forward then, is Judge Wickens here.

JUDGE CHAMBERLAIN: Can I just say one thing. There was a comment made a moment ago about the 1963 Constitution and judges no longer ran circuits. Isabella County in 1963 was a minimum of 7, I think it was higher than that, a 7 county circuit.

JUSTICE CORRIGAN: Thank you. Judge Wickens you can have the balance of Judge Chamberlain's time.

JUDGE WICKENS: First of all I'm Judge Mark Wickens, the Lake County trial court judge and I'm happy to be here today. In brevity I certainly agree with what Jim Fisher has already spoken to you about and so I'm not going to repeat those comments that he might have made. Just as a couple of practical issues though is what I

really wanted to talk about more than anything else. The proposal we're asking you to adopt is nothing unique or new. I've got more gray hair than when I started doing this particular job that I do but the proposal we're making really follows along with a common practice over many years. We have been cross-assigning judges in particular situations over my length of my memory I remember when Justice Williams was the Chief Justice and we were doing it then. A couple of classic examples. Part of my practice before becoming a full-time judge in the pilot project cases, I practiced domestic relations in adjoining counties to my own. As I would go to the adjoining county quite often there would be the probate judge who had been assigned to handle the cases in that particular jurisdiction and there was nothing made of that. We showed up, we handled our case, he did a fine job and we went home. Also in my own county a similar situation. We had one of the drug teams active approximately 6 or 8 years ago and in that particular situation because of the increased caseload we saw we had a retired probate judge from another county appointed to come in and cover the drug cases that were occurring at that time. So again, another situation where a visiting judge came in and was appointed to handle all those cases and again nothing was made of that at all. So the fact that we're talking about assigning judges and cross-assigning them to different courts, that has occurred, it's occurred for many, many years and I don't see that the proposal we're talking about is really any change other than allowing it to continue.

JUSTICE TAYLOR: Sir, do you not find a distinction between doing it episodically and on an emergency basis and doing it routinely for time indefinite.

JUDGE WICKENS: I think there may be a distinction there but the practice I'm talking about has occurred on a routine basis.

JUSTICE YOUNG: You mean somebody was permanently assigned as a visiting judge.

JUDGE WICKENS: Getting back to my domestic relations example, in that particular situation that was the norm was the circuit judge was very busy doing other matters and the probate judge was assigned to handle the domestic relations caseload and as attorneys we would go and he would take care of the cases.

JUSTICE CORRIGAN: Thank you for coming today Judge Wickens. I do not see Judge Alton Davis in the courtroom. Is Judge Schwedler in the courtroom, Iron County Probate Court. He's not present. Kerry Erdman, Court Administrator, 35th District Court in Plymouth.

MR. ERDMAN: Good morning, my name is Kerry Erdman. In December 1996 the 35th District Court and Wayne County Probate Court entered into a joint

operating agreement through local administrative order to allow the judges of the 35th District Court to be cross-assigned as probate judges and later circuit judges for the purpose of handling juvenile misdemeanor matters at the local level. That program has been extremely effective. The program has the support of local law enforcement, public schools and their officials, local communities and the public. We have found that the level of attention to the local youth has been far greater with extremely positive results than might be received at the more distant county court.

JUSTICE CORRIGAN: Mr. Erdman does that exist by virtue of a local order that was approved by SCAO or by the Supreme Court.

MR. ERDMAN: By SCAO. I think the theme would be best stated as local attention to local problems. Many other communities are eager to adopt similar programs. While the program has been successful over the past five years at the 35th District Court, I think in its present form it needs to be addressed on a more permanent basis. While I do not believe jurisdiction should be transferred outright from the family court to the district court as one size obviously does not fit all, I would ask that consideration be given to possible concurrent jurisdiction over juvenile misdemeanor matters as part of court reorganization.

JUSTICE CORRIGAN: All right, thank you for coming today. Kathy Miller.

MS. MILLER: Thank you for allowing my voice. My name is Kathy Miller. My comments on PPOs, the Performance and Incentives Act, MCR 8.113 and certified assurance contracts are based on personal experience. Denied by the attorney grievance and judicial tenure, I reported my case problems to the administration for children and families. When ex parte PPO changed custody of my child born out of wedlock paternity is not established with any court in the United States of America. My case was not in family court. Denied by the prosecuting attorney for custody issues and denied by the friend of the court for no paternity case, the judge failed to order an investigation of support and ordered a psychologist who went to prison for child molesting. I am asking the liberal issuance of PPO's be reviewed. My child was admitted to a mental institution with an adjustment disorder. The IRS audited me for non-certified services. Title VI civil rights act regulates the child support program. No person can be segregated or denied the right to a government funded program. This regulatory agency informs president of chief judges of my possible civil rights case in January. He signed to join the federal program and retired. I requested a performance audit by the Auditor General. Court that failed to meet the family support act deadline were to be audited to ensure establishment of paternity orders, collection and disbursement. I am requesting compliance with the Performance and Incentives Act of 1998. Washington Inspector

General received a copy of unfriendly court broken system treats families with a complaint of mismanagement. I wrote John Ferry, contact person for government funded programs pursuant to MCR 8.113, request for investigations of courts. The rule does not specify if or when you will receive a response. An investigation was issued. When the friend of the court admitted the case was amiss and out of control the investigation was dropped. The rule includes the attorney grievance, judicial tenure and allows the Supreme Court superintending control. I'm asking this rule be amended so these offices can function. The auditor general sent me a letter, the friend of the court is bound by a consent judgment not signed by any party of record. This violates the certified assurance contract to maintain funding. No person can be denied the right to a government funded program by contractual arrangements. If my customer servicing needs are not met I will pursue the channel recommended by the United States Department of Justice for relief and damages. And I have a letter from the Auditor General about the binding of the courts.

JUSTICE CORRIGAN: Thank you Ms. Miller. You are welcome to submit that to our clerk. Is Honorable Joseph Swallow present today? Honorable Kurtis Wilder of the Michigan Judges Association.

JUDGE WILDER: Good morning Chief Justice Corrigan and Justices of the Court. Kurtis T. Wilder on behalf of the Michigan Judges Association. As you know the MJA has recommended that the Court continue cross-assignments of judges as requested by local courts consistent with current policies and practices. Getting right to some of the concerns that have been expressed by questions raised by the Justices this morning, MJA believes that there are several provisions that need to be looked at quite carefully. One of them is in Art. 6, Sec. 23, the phrase "for limited periods or specific assignments". Another is in Art. 6, Sec. 15, the provision that states that the jurisdiction powers and duties of the probate court and of the judges thereof shall be provided by law and finally the powers under Art. 6, Sec. 4 of this Court of the control of the courts generally. Again I think I would reference the legal memoranda that have been submitted on the various points but I think it's important to recognize that our Legislature provided in MCL 600.1003 and accompanying provisions for family division circuit court and the Legislature also provided in those provisions that the probate judges shall be assigned as provided by the chief judge of the circuit court to the family division. I believe that is consistent with Art. 6 Sec. 15 to day that in fact probate judges are being assigned consistent with the law and consistent with democratic principles under the principles on which they are elected. They are elected as a probate judge to decide cases as determined by the Legislature and the Legislature has determined that where the chief judge of the circuit court assigns them to the family division of the circuit court, that is where they shall serve. Finally, the provision of Sec. 23 that provides for assignment for limited period or specific assignment has to be interpreted so that specific assignment is different

than limited period. Otherwise we render the language nugatory and I believe the fact that those provisions are contained in the judicial vacancy portion of the Constitution, particularly given their historical usage, suggests that continued cross-assignment of probate judges to the family division of the circuit court would be appropriate. As has already been mentioned, we assign judges already to drug courts on permanent assignment. We have assigned judges historically for assists with docket purposes, not because there is any judicial vacancy in any particular court but because there is a need or an inadequacy of judges to handle the docket in a particular court and this Court has assigned judges to sit in courts where there is insufficient judicial resource. The Legislature has determined that family division jurisdiction shall be vested with the circuit court. Unfortunately there aren't sufficient judges in certain circuit courts in order to handle the load of cases consistently with the way the Legislature has provided they be handled in a family division with judges specifically assigned. It is consistent with the Constitution and with the statutory framework for this Court to make assignment of judges, specific assignments.

JUSTICE YOUNG: Permanent?

JUDGE WILDER: Well if that's what is required.

JUSTICE YOUNG: Have you had occasion to read Judge Batzer's

JUDGE WILDER: I have.

JUSTICE YOUNG: And what do you make of his arguments.

JUDGE WILDER: I think his argument is a very compelling one but there are also compelling arguments on the other side.

JUSTICE YOUNG: This is a constitutional argument that we do not have the power to make permanent assignments of the kind you're asking us to make.

JUDGE WILDER: I believe when you review some of the cases dealing with removal of judges from office that while this Court doesn't have the power to remove judges from office because that is specifically prohibited by the Constitution, this Court does have the authority to suspend judges and to suspend them even beyond their elected term of office which in effect means they have been removed for the period of that term. So I believe that this Court does have some expansive powers under Art. 6, Sec. 4.

JUSTICE YOUNG: Even if the constitutional question were clear, don't

you have any concern about the Court making permanent assignments as a policy question.

JUDGE WILDER: Are you asking me personally or asking me as president of MJA.

JUSTICE YOUNG: However you happen to be speaking today.

JUDGE WILDER: Well I'm speaking on behalf of the MJA today and the MJA has not addressed that question. Ask me in January when I am no longer president.

JUSTICE WEAVER: Is there any difference in your mind between indefinite and permanent.

JUDGE WILDER: I believe there is a different between indefinite and permanent and I think this Court has recognized that in connection with its discipline powers under the Constitution. When you deal with suspension versus removal. The bottom line is, at this present time it is widely recognized that there is no political consensus as to how we move court reform.

JUSTICE YOUNG: Let me ask you, Judge Kelly made quite an interesting presentation this morning.

JUDGE WILDER: She did and it was the first that I've heard it and obviously it's another proposal that needs to be considered.

JUSTICE YOUNG: Had the value of at least simplicity.

JUDGE WILDER: It is very simple. I can imagine that the probate judges will simply oppose that provision that transfers them because I don't know that the numbers work out so that you can say in X county we could take three or four judges, whatever the number is, and assign them cleanly to the circuit court without impacting the dockets of the remaining court. In the transfer of recorder's court judges to the circuit court, the entire caseload of the recorder's court was transferred to the circuit court. That doesn't happen when you're taking probate judges and transferring them to the circuit court. There are still cases remaining to be handled. And there may not be a clear way of saying we're going to take five judges here

JUSTICE CORRIGAN: Doesn't even that whole order of transfer that this Court entered in the recorder's court situation demonstrate the lack of wisdom in the

proposal to continue cross-assignments indefinitely. Did that not demonstrate the problems of judges being sent to serve in courts where they had not been elected.

JUDGE WILDER: It demonstrates problems, sure. And again my answer is, as I was stating before, there is no political consensus at this time and the proposal that I believe the demonstration project chief judges, as modified by the MJA and the other associations, recognizes is that there is an opportunity to continue to invite local courts to examine the consolidation that has been occurring in the demonstration projects and perhaps out of that continuation create some political consensus about what the next step is.

JUSTICE YOUNG: Why can't we have an element of any eventuating proposal one that will allow, assuming all the concerned entities agree, to allow them to do what we're doing in the demonstration projects. Why isn't that one element of any court reorganization plan, that we allow local courts, whether like Barry, to stem to stern, circuit to district, organize in a way that is satisfactory to that locale.

JUDGE WILDER: Well let me answer it this way in part of the discussion in coming up with MJA's proposal there were in fact proposals that suggested that perhaps you separate larger counties from smaller counties, that you treat them differently because the caseloads in fact warrant that. Perhaps you would look at a concurrent jurisdiction or a constitutional merger in the counties or a transfer as Judge Kelly suggested, something that would allow for bringing the two courts together in some fashion. Whereas in other communities where you couldn't make a clean break of numbers of judges, you would in fact create that kind of situation where you could have at the local level a request, either a local referendum, some procedure where the local electorate would have the opportunity to adopt a consolidation in their own community.

JUSTICE CORRIGAN: Why not make that statutorily based so there is the vote of the peoples' elected representatives in the matter.

JUDGE WILDER: You could make that statutorily based under those scenarios. In fact we have a provision now that permits by county resolution the adoption of judicial councils that can lend toward the management of the courts if the local community desires to proceed in that fashion. That's a possibility, certainly. But what I'm saying is the reason the MJA ended up where it ended up is

JUSTICE YOUNG: It's because it wants a status quo.

JUDGE WILDER: Well let me respond to that because there are some who would say, and you would find some support for this from some practitioners, that

the old way before the family division changed, before the family division legislation, worked just fine. There were selected communities where there were problems and that is what led to the great discussion about creation of the family division. The point is we are where we are now. The status quo is something that works for the time being and I believe there is a recognition that there has to be some changing of the political consensus or development of political consensus so we can move to the next step. But we're not there yet.

JUSTICE WEAVER: The people actually assigned, they're assigned to indefinite periods as opposed to permanent periods, isn't that true. That's what I've even hearing in Wayne County, people come and go. I don't think they way permanent, I think they just assign them over with no term.

JUDGE WILDER: I assume that's correct because I believe they can be transferred out.

JUSTICE WEAVER: It seems to me we as the Court always has to go back to the Constitution as to what our powers are and aren't and we have to read the Constitution with appropriate meaning. The section that seems to worry a lot of people about assignment is Section 23, judicial vacancies, which is its title and it is addressing when there are judicial vacancies, that is something has died, resigned or been removed. And the last sentence is "The Supreme Court may authorize persons who have been elected and served as judges to perform judicial duties for limited periods of specific assignments." That's where the limited periods of specific assignments language comes from. But note it says persons, not judges, who have been elected and served, not serving. This is the language that allows us to appoint people who are retired, who were judges, able to serve as judges. Elsewise I think we would have no authority to appoint people who had been elected and had served but are not elected now or appointed and served. And so that sentence applies to letting retired judge X be appointed to serve. Now he must be appointed, or she, as a retired judge, as for a limited period or specific assignment. The authority for the Supreme Court to make assignment of sitting judges has got to be found in our general superintending control, which is the Supreme Court shall have general superintending control over all courts; Section 4. Then it goes on to say more powers that we have. Then the last sentence is pretty interesting because it says "The Supreme Court shall not have the power to remove a judge" so it's limiting our power in that one way, that we can't remove a judge. However it doesn't say we can't assign judges. Now we've got to know that the people who put this Constitution in effect meant the Supreme Court to assign judges indefinitely. Why? Because the need for judges does not occur in wholes. It occurs in parts. If you in Washtenaw County as you grow, or let's say in Lake County, just as the populations shift, they may need $1/10^{th}$ of a judge or 20% of a judge, or maybe 60% of a judge, but the problem is judges only come in wholes,

right. People only come in wholes, needs come in parts. So while you have kind of a minimal need, under a half, technically, you can assign over somebody to meet the need because those people, while they don't need a whole judge, they actually need the service. This man right here is telling us that, from Dads of Michigan, among other things he's telling us. But they need the help. Now did the people of Michigan and the people who did the Constitution anticipate that you just have to sit around and wait until the Legislature and the county boards decided you needed a whole judge over there, or are they supposed to be able to get assigned somebody to help them on an indefinite period.

JUDGE WILDER: Well as I indicated before, this Court has historically made assists with docket assignments where there is no vacancy.

JUSTICE WEAVER: Former courts of this body of the Supreme Court have recognized we have this power to assign. It isn't necessarily permanent, it is indefinite and it's under that section. The only limitation on our superintending control here is "shall not have the power to remove a judge". Now that's the debate going on here and it's an important one because we do need to be able to assign judges where they are needed, and for an indefinite period of time until the need it met. The people need to be served.

JUSTICE MARKMAN: One wonders why the framers of the 1963 Constitution put any of the other 29 sections in Art. 6 given that under the view of some, Art. 4 seems to cover everything.

JUSTICE WEAVER: Well they had to provide for vacancies which is exactly what they did in Section 23. That's why you have Section 23, because if somebody dies, is removed or resigned, that's an immediate need and so that's when they said what you can do. The Governor can appoint. Did they say when the Governor had to appoint. The Governor could sit there and not do it at all or he could do it when he wanted. And they also say you can bring in extra troops, that is judges who were judges who are no longer. They resigned. I don't know that they meant you get one that was removed and it would be tough to get the ones that died, but you could get the ones that had retired and you could bring them in as extra forces on the team to serve the people. But then, since they haven't been elected now democratically, are going to be done on a limited period off the special assignments. Now that makes sense of the Constitution. It gives everything meaning. Elsewise if we just take this phrase, this last thing in Section 22, that means we may not be able to meet the needs of the public by assigning for an indefinite period when we can't tell how long it's going to be and we won't every day make an order or every three months or six months or what have you. The people I think, and the framers had a sense that the Supreme Court would have some sense.

JUSTICE CAVANAGH: Judge Wilder, let me ask you, might MJA in its January meeting consider Judge Kelly's proposal.

JUDGE WILDER: Well when we leave here today I intend to let Judge Root who is the incoming president of the MJA know about this latest proposal and I don't know who his legislative committee chair will be but obviously that will be a topic of discussion.

JUSTICE YOUNG: The question you raised about that proposal is the recorder's court the whole jurisdiction came over with the merger, but as I understand Judge Kelly's proposal, it is putting in a sense a legislative imprimatur on what we've already ordered by cross-assignment. So whatever we have done, however improvidently or providently in terms of allocating probates to the circuit court, that's already done.

JUDGE WILDER: Well let me respond to it this way. I'm familiar with Washtenaw County as a demonstration project. I know that Judge Kirkendall, who is one of two probate judges, handles not just the family division, domestic relations, juvenile, but he also handles the estates and mental health. Now I don't know if the caseloads would match up so that you could transfer one judge. You can't transfer half a judge.

JUSTICE CORRIGAN: That would have to be analyzed in every county where they were cross-assigned.

JUDGE WILDER: Absolutely and that's why I don't know if that legislation works because you may not be able to make a 1-1 transfer based on caseloads.

JUSTICE CORRIGAN: Okay, thank you Judge Wilder. Any other questions Justices? May we hear now, your name was taken in vain, Judge Batzer, would you come forward. We mentioned your name.

JUDGE BATZER: Good morning, Chief Justice Corrigan and Justices of the Court. I'm James Batzer, I'm the circuit judge for Manistee and Benzien Counties. I had a truly outstanding and extraordinary law professor who said when we're dealing with constitutional issues we ought to look at the specific provisions of the Constitution and see what they have to say. And so in drafting my memorandum I took that admonition from Profession Granlow that I remembered from long ago. Whether there is political consensus or not, there is a Constitution. And the Constitution contemplates the assignment of judges and it reposes the ability to assign those judges entirely and completely in the Supreme Court of this state. And in one section of the Constitution this Court can assign circuit judges to sit as Judge Huff learned to his chagrin, in any circuit and I think to any bench. And that provision gives that circuit judge, it confers him with

the authority to exercise the judicial authority of the state of Michigan in another circuit. And this Court's supervisory control in the superintending control clause gives this Court the ability to compel that circuit judge to go sit even if that judge doesn't want to. The only other express constitutional provision relating to the assignment of judges is in Section 23 and that is a provision for when a judicial vacancy exists. And that's it. There isn't anymore. And that's the Constitution. So there has been questions, and there have been rumblings from the inception of the family division amongst the judges as to the legitimacy of it, assigning the probate judges to sit permanently. This Court has to deal with it. It has to deal with it on the basis of constitutional fidelity. Is it convenient for me to have a probate judge, a district judge, any of these judges on cross-assignment to cover me when I need some relief. Of course it's convenient and we've done it for years. But as I examined into the Constitution, questions as to the constitutionality of that process really arose. Clearly, a circuit judge can cover for me. A litigant can go to an adjoining circuit and ask for something if I'm out of town, if I'm unavailable. And in point of fact, it's no further to do that in the counties surrounding my two-county circuit than it is for me to drive up and down the road to my other county. That's the constitutional system that is contemplated. I think that there may indeed be a statutory authority in Art. 6, Sec. 15 wherein the Legislature could authorize this Court to assign probate judges, judges of a court of limited jurisdiction by the Constitution, to sit as judges of probate in other counties. Or as visiting district judges. But where is the authority in the Constitution to assign a judge of limited jurisdiction as opposed to general jurisdiction to a superior tribunal. Maybe I've called into question the ability to assign circuit judges to sit on the Court of Appeals under Art. 6, Sec. 11.

JUSTICE CORRIGAN: Judge Batzer I need you to summarize your position as your time is up, sir. And you have submitted written documents to us.

JUDGE BATZER: I have, and that sets it out, and Marbury v Madison says the Legislature cannot confer judicial authority on the judicial branch that the Constitution doesn't put there and I think we're faced with those kinds of issues and I think this Court is going to have to answer it.

JUSTICE CORRIGAN: Okay. Any questions for Judge Batzer, Justices? Thank you for coming today. Autumn Rivest. Is she here? Karen Hamilton.

UNIDENTIFIED SPEAKER: Karen Hamilton had to step out. She (inaudible) documentation to you.

JUSTICE CORRIGAN: Very well, thank you. This public hearing of the Michigan Supreme Court is adjourned.